MOTION FILED

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No. 97-387

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

SCHUYLKILL ENERGY RESOURCES, INC.
Petitioners,

v.

PENNSYLVANIA POWER & LIGHT, INC.
Respondents.

MOTION OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA TO FILE AN AMICUS BRIEF OUT OF TIME AND AMICUS BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MOTION OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA TO FILE AN AMICUS BRIEF OUT OF TIME

The Attorney General of the Commonwealth of Pennsylvania ("Attorney General") respectfully moves this Court for permission to file an amicus brief out of time in the above matter.

1. This case involves antitrust standing in soon-to-be regulated markets.

2. The Attorney General originally decided not to file an amicus brief in this case.

3. Subsequent to that decision, the Attorney General has become involved in an onslaught of litigation over deregulation issues. One case, involving the merger of Allegheny Power System and Duquesne Light Company currently involves litigation before the Federal Energy Regulatory Commission: Application for Merger Approval and Related Authorizations among DQE, Inc., Allegheny Power System, Inc. and AYPSub, Inc., Docket Nos. EC97-46-000, ER97-4050-000; and ER97-4051-000; the Pennsylvania Public Utility Commission: In re: Joint Application of DQE, Inc. and Allegheny Power System, Inc. and AYPSub, Inc. for Approval of the Transfer by Merger of the Property and Rights of Duquesne Light Company to Allegheny Power Systems, Inc., Docket No. A-110150F0015; and the United States District Court for the Western District of Pennsylvania: *Washington Power (I), Inc. and Air Products and Chemicals, Inc. v. Allegheny Power Systems, Inc., Allegheny Power Service Corporation and West Penn Power*, Civil Action No. 95-0658 (filed May 2, 1995, amended October 4, 1996, W.D. Pa.); *Champion Processing, Inc., North Branch Energy, Inc. and Air Products and Chemicals Inc. v. Allegheny Power System, Inc., Allegheny Power Service Corporation and West Penn Power Company*, Civil Action No. 96-0598 (filed April 1, 1996, amended September 30, 1996, W.D. Pa.); *City of Pittsburgh v. West Penn Power Company, Allegheny Power System, Inc., Duquesne Light*

Company and DQE, Inc., Civil Action No. 97-1772 (filed Sepember 29, 1997, W.D. Pa.).

4. All three bodies are looking at the competitive impact of the merger.

5. It is anticipated that other mergers will occur in the telecommunications industry which will prompt similar litigation.

6. Upon further reflection, the Attorney General determined that any ambiguity of standing in the newly deregulated industries could cause confusion among the courts or the regulatory commissions.

Therefore, the Attorney General respectfully requests that this court grant the Attorney General's motion to file an amicus brief out of time.

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AMICUS BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD CIRCUIT

In *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light, Inc.*, 113 F.3d 405 (3d. Cir. 1997), the Third Circuit denied standing to a potential new entrant into an electricity market which was about to be deregulated. The Attorney General of the Commonwealth of Pennsylvania (hereinafter "Attorney General") respectfully files this *amicus* brief to urge this Court to clarify antitrust standing in newly-deregulated markets. The Attorney General takes no position on the merits of the underlying dispute between the parties.

The Third Circuit's decision "conflicts with applicable decisions of this Court," Sup. Ct. R. 10(c), and will undermine state antitrust enforcement in deregulated electric and telecommunications markets. Deregulation throughout the economy is likely to raise questions of antitrust standing repeatedly in the future.

INTEREST OF THE AMICUS STATE

This case involves the application of the antitrust laws to an emerging deregulated market. The Commonwealth focuses on one portion of the Third Circuit's opinion in this brief. The Third Circuit held that an antitrust plaintiff in a market about to be deregulated did not have standing to challenge actions designed to keep the plaintiff out of that future market because the plaintiff was not yet a competitor. 113 F.3d at 416. The issue is at what point do those parties, who intend to enter newly-deregulated markets, have antitrust standing to complain about acts which injure them in violation of the antitrust laws. This case is significant because of the national trend toward deregulation. While the instant case involves deregulation of electric generation services in Pennsylvania, similar issues can occur with regard to the application of the Telecommunications Act of 1996, Pub. L. No. 104-104

(1996) and electric deregulation efforts in the other 39 states.[1] In most cases of deregulation, the incumbent monopolist will continue to play a role in delivering the deregulated service either through ownership of local telephone switches and lines, as in the case of telephone service, or through the ownership of local transmission lines, as in the case of electric service. The ongoing forced relationship between incumbent monopolists and new entrants sets the context for the dispute in this case.

As the chief law enforcement officer of the Commonwealth of Pennsylvania, the Attorney General is one of the primary enforcers of the federal antitrust laws within the state.[2]

SUMMARY OF REASONS *CERTIORARI* SHOULD BE GRANTED

Electric and telecommunications deregulation across the country will pit incumbent natural monopolists against new competitors. This Court should grant *certiorari* in this case to affirm that upstart competitors have antitrust standing to challenge actions which they believe violate the antitrust laws, but which occur prior to complete deregulation of the market.

ARGUMENT

This dispute arises out of a contract between SER and PP&L regarding the sale of electricity. SER has contracted to sell 79.5 megawatts of its energy plant's output to PP&L for a period of

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[1]So far, eleven states, California, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, Oklahoma, and Pennsylvania, have enacted some form of electric utility deregulation.

[2]71 P.S. § 732-204(c).

20 years. PP&L is obligated to buy the electricity except during, among some other limited times, "system emergencies." 113 F.3d at 411.

SER alleges that PP&L is trying to monopolize the market for electricity by declaring numerous "sham" transmission "system emergencies;" thus, causing SER to lose the revenues from selling energy and incurring other incidental costs. SER claims that the loss of electricity sale revenue and other increased costs resulting from the "sham" system emergencies will cause it and other independent power producers to exit the market place before deregulation takes effect.[3] *Id.* SER alleges two separate federal antitrust violations by PP&L under the Sherman Act, 15 U.S.C. § 1 *et seq.* (1994). In the first count, SER alleges a claim of monopolization in violation of section 2 of the Sherman Act. In the second count, SER alleges a claim of attempt to monopolize in violation of section 2 of the Sherman Act.

PP&L has been regulated as a natural or legal monopoly. Many advancements in technology have been made that will allow competition in the wholesale and retail electric markets. These advancements led to the passage of the Pennsylvania Electricity Generation Customer Choice and Competition Act ("Customer Choice Act") 66 P.S. § 2801 *et seq.* The Customer Choice Act's first phase begins January 1, 1999, after a 1997-98 pilot program period. This gives consumers the opportunity to choose their electricity supplier. The Customer Choice Act phases in competition for electricity during 1999-2001. On January 1, 1999, electric utilities must offer a choice of electric suppliers to a maximum of 33% of the peak load of each customer class: on January 1, 2000, electric utilities must offer a choice of electric

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[3] Again, the Attorney General takes no position on whether the acts alleged by SER, namely the repeated declaration of system emergencies, allegedly for improper reasons, constitutes an antitrust violation. The Commonwealth's sole interest in this petition is on the standing question.

suppliers to a maximum of 66% of the peak load of each customer class and on January 1, 2001, all customers must have the opportunity to choose suppliers. 66 Pa. C.S.A. § 2806(b). Suppliers must be approved before they can offer electricity to consumers.

The District Court dismissed SER's complaint for failing to state an antitrust injury. 1996-1 Trade Cas. ¶ 71,447 (E.D. Pa. 1996) (Pet. App. at 32a). Specifically, the District Court cited SER's failure to allege injury to competition generally not just to itself (Pet. App. at 33a) and the speculative nature of SER's claim that PP&L will be able to raise electric rates to consumers at some point in the future if it drives firms like SER from the market (Pet. App. at 33 and 37a).

The Third Circuit affirmed the District Court's dismissal. One reason for dismissal was the inability of SER to currently compete in the electricity market even though the Customer Choice Act would give SER that right in the future. In reference to the passage of the Customer Choice Act, the Third Circuit held:

> We will not attempt to predict the future of competitive retail access in Pennsylvania. We do not know whether SER or PP&L will even exist in 2001, and we certainly do not know whether PP&L will enjoy an unlawful monopoly in its service area at that time. What we do know is that SER is presently unable to compete with PP&L, both by agreement and by law. While SER attempts to characterize itself as PP&L's competitor on the eve of deregulation, we conclude that SER cannot, as a matter of law, establish that PP&L's generation curtailment policy creates an injury of the type the antitrust laws were intended to prevent.
>
> 113 F.3d at 416 (footnotes omitted).

In a footnote attached to the end of the above passage, the Third Circuit added that it was not deciding whether PP&L's activities would violate the antitrust laws in a "competitive market." *Id.*

Separate and apart from the facts of this case, the Third Circuit's opinion appears to give incumbent monopolists carte blanche to injure potential entrants into soon-to-be deregulated or partially deregulated markets because the new entrants do not have standing to fight back. The Commonwealth asserts that this is an improper application of antitrust standing principals.

Antitrust standing is set forth in 15 U.S.C. § 15 which grants standing to any person injured in his or her business by anything prohibited by the antitrust laws. This Court requires plaintiffs in antitrust cases to show that they have been injured by an activity antitrust laws were designed to prevent. *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977). Standing has been granted to those who are the intended victims of anticompetitive conduct. *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). The Third Circuit has misapplied these standing principles in this case.

SER contends that PP&L declared false system emergencies with the intent to drive up SER's costs and damage its equipment.[4] Normally, this type of alleged injury would be sufficient to establish antitrust standing. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

In its opinion, the Third Circuit recognized the passage of the Customer Choice Act but held that any potential injury to SER

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[4] No discovery has been taken in this case so it is unclear whether SER will find evidence to support its contention that the system emergencies were in fact false. Since this issue was decided on a motion to dismiss, SER's allegations are assumed to be true. *Schuylkill Energy*, 113 F.3d at 411.

as a potential competitor under this Act was too speculative. *Schuylkill Energy*, 113 F.2d at 416. This was an improper conclusion to make on a motion to dismiss. SER alleged that PP&L, an incumbent monopolist, about to lose its monopoly, engaged in acts designed to drive SER and other potential electricity generators out of business before they would be able to compete with it. The antitrust laws are designed to prevent monopolists from engaging in predatory conduct which raises rivals' costs. It is unclear why SER, or anyone else in SER's position in the future, lacks standing to prove its claims on the basis that the electricity market has not been deregulated yet.

By dragging timing into its analysis of standing, the Third Circuit's opinion in this case has unnecessarily confused the law of antitrust standing. Clearly, if an entity in PP&L's position engaged in predatory conduct against new competitors in 2001, after deregulation of the electric industry was complete in Pennsylvania, the new competitors would have standing. But what if PP&L, or any other entity, engaged in the same alleged acts a week before the market was completely deregulated? Would these new competitors still have standing? What result does the Third Circuit's decision mandate when only 33% of Pennsylvania consumers can participate in a deregulated market after January 1, 1999? It appears from the court's decision that an incumbent monopolist could do anything to its new competitors until 2001, a huge disadvantage to those competitors and a result not consistent with this Court's previous opinions.

For these reasons, we respectfully request that this Court grant the petition for *certiorari* in this case on the narrow issue of when entities about to enter to newly deregulated markets have standing under the antitrust laws.

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